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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

FORT SUMTER TOURS, INC.,

Petitioner,

v.

BRUCE BABBITT SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL PARK HOSPITALITY ASSOCIATION IN SUPPORT OF PETITIONER'S, FORT SUMTER TOURS, INC., PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Whether the abandonment of a longstanding agency policy – one of 36 years duration – required the Fourth Circuit to heighten its scope of judicial scrutiny and apply considerably less deference to the National Park Service's abandonment of that longstanding policy pursuant to this Honorable Court's holdings in *Motor Veh. Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29 (1983) and *Good Samaritan Hospital v. Shalala*, 508 U.S. ___, 124 L.Ed 2d 368 (1993).

2. Whether the adoption of a legislative rule by the National Park Service that changes the rights and obligations of private parties requires the agency to comply with the notice-and-comment provisions of the Administrative Procedure Act in the adoption of that regulation, pursuant to this Honorable Court's holding in *Lincoln v. Vigil*, 124 L.Ed.2d 101 (1993).

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the National Park Hospitality Association submits this brief *amicus curiae* in support of Petitioner, Fort Sumter Tours, Inc. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, the National Park Hospitality Association ("NPHA") is a non-profit corporation, incorporated in the State of Virginia. The NPHA's members are companies and business men and women who contract with the National Park Service ("NPS") to provide visitor services in units of the National Park System. The NPHA represents the interests of its members in all aspects of National Park System concession contracts and visitor services before the National Park Service and the public. The NPHA has approximately 150 members, including operators of virtually all of the major concessions throughout the National Park System. One of the NPHA's members is Fort Sumter Tours, Inc., ("FST").

This case presents the important and nationally-significant question of whether the National Park Service has interpreted 16 U.S.C. § 20b, regarding the application and calculation of concession franchise fees, in accordance with the will of Congress and in accordance with the requirements of the Administrative Procedure Act. As concessioners operating in the National Parks, NPHA members will be adversely affected by the outcome of this case. Moreover, since the setting of franchise fees, by the NPS, directly affects the ability of concessioners to continue concession operations within the National Park

System, all visitors to units of the National Park System will be adversely affected by the inability of concessioners to continue to operate concessions for the enjoyment of the visiting public.

OPINIONS BELOW, JURISDICTION, STATUTE INVOLVED AND STATEMENT OF THE CASE

Amicus Curiae hereby adopts Petitioner's description of the opinions below, jurisdiction, statutes involved and statement of the case.

REASONS FOR GRANTING THE WRIT

I. THE FAILURE OF THE FOURTH CIRCUIT COURT OF APPEALS TO REVIEW THE NATIONAL PARK SERVICE'S GUIDANCE DOCUMENT, NPS-48, WITH HEIGHTENED JUDICIAL SCRUTINY AND CONSIDERABLY LESS DEFERENCE IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS HONORABLE COURT.

In reviewing challenged agency decisions, the scope of review is set out in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). As this Honorable Court has held, the APA requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Moreover, although agency action is entitled to a presumption of

regularity, "that presumption is not to shield . . . [agency] action from a thorough, probing, in-depth review." *Id.*

In applying this standard of review, this Honorable Court has specifically spoken to the situation presented in this case – an agency's change to longstanding policy. *Motor Veh. Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29 (1983) makes clear that court review of agency action that constitutes a reversal of longstanding agency policy is subject to close scrutiny. Moreover, the reviewing court must apply a presumption of correctness to the agency's previous, longstanding policy:

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."

Motor Vehicle, at 41-42 (quoting *Atichison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)). To overcome this presumption of correctness, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 42.

In addition to applying a presumption of correctness to longstanding agency policy and requiring a heightened explanation from an agency changing longstanding policy, this Honorable Court has consistently held that less deference is owed in reviewing an agency's inconsistent policy. *See, Good Samaritan Hospital v. Shalala*, 508 U.S. __, 124 L.Ed 2d 368, 382-83 (1993) ("the consistency of an agency's position is a factor in assessing the weight that

position is due. As we have stated, 'an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.'" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987)); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) ("We have recognized previously that the weight of an administrative interpretation will depend, among other things, upon 'its consistency with earlier and later pronouncements' of an agency." (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Notwithstanding the heightened judicial scrutiny and considerably less deference required by *Motor Vehicle* and *Good Samaritan* in a review of an agency's change to longstanding policy, the Fourth Circuit erroneously relied upon *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and deferred to the NPS's adoption of NPS-48.[1] NPS-48 is the NPS's 1986 abandonment of its prior, longstanding policy regarding the calculation of franchise fees pursuant to 16 U.S.C. § 20b(d). In this case, the NPS relied upon NPS-48 to justify a nearly three-fold franchise fee increase sought

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[1] Concessions Management Guidelines, National Park Service No. 48 (Release No. 2: Amendment No. 1) (March 6, 1987) ("NPS-48").

from FST.[2] Thus, the ultimate issue is whether NPS-48 is a proper interpretation of 16 U.S.C. § 20b(d).

In reviewing NPS-48, the Fourth Circuit should have applied this Honorable Court's decision in *Motor Vehicle* to afford a presumption of correctness to the NPS's prior, longstanding policy regarding the application and calculation of franchise fees and, additionally, to require from the NPS a heightened explanation for the abandonment of that longstanding policy. Moreover, the Fourth Circuit should have afforded "considerably less deference" to NPS-48, the NPS's new policy, pursuant to this Honorable Court's holding in *Good Samaritan*. Therefore, this Honorable Court should grant the Petition to review the decision of the Fourth Circuit regarding the proper scope of judicial scrutiny and level of deference to be applied in a challenge to an agency's change to longstanding policy.

A. The Fourth Circuit Should Have Applied A Presumption Of Correctness To The NPS's Prior, Longstanding Policy With Respect To The Calculation Of Concessioner Franchise Fees.

Franchise fees in concession contracts have been debated since the inception of concessions in National

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[2] The impact of the attempted increase is evidenced by reference to the years 1992 and 1993. At 4.25%, FST paid a franchise fee of $165,717.00 to the NPS for these two years. FST's net income from concession operations before income taxes was 8.67% and 7.77% of gross revenues, respectively. At 12%, over the same two years, what the NPS seeks under NPS-48, the fee would be $468,466.65, an increase of over $302,000. Net income from concession operations before income taxes would be 0.97% and 0.07% of gross revenue, respectively.

Parks. This debate is set forth in the legislative history of the Concessions Policy Act of 1965 ("CPA") found at S.R. No. 765, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News 3489 (hereinafter "Senate Report"). Prior to World War II concessioners were entitled to earn net profits equal to 6 percent of their investment before paying a franchise fee. This "priority" of net profits was to be cumulative from year to year, if not earned. Just prior to and during World War II, concessions were drastically curtailed and even closed. Thus, after the war, when they reopened, the "priority" of net profits due was substantial. As a result:

> little, and in some cases, no franchise fees were paid to the Government as a consequence of the built-up unearned priorities, although the profits and gross receipts of the concessioners were the highest they had ever experienced. This caused criticism of such a franchise fee basis by the Department in 1946. Alternate franchise fee bases, with definite profit limitations, were proposed by the Department for new contracts, but were . . . not acceptable to concessioners whose contracts were up for renewal.

Senate Report at 3496.

The impasse lead to the appointment, by the Secretary of the Interior, of a concessions advisory group that issued its report in 1948. Significantly, the report recommended that "the national parks should not be regarded as a (sic) revenue producing and that franchise fees should be abolished insofar as practicable." Senate Report at 3496. In 1950, the Secretary adopted policies controlling concession practices that remained in effect until the passage of the CPA. With respect to franchise

fees, these policies recognized "that adequate service to the public at reasonable rates is more important than the amount of franchise fees paid to the Government by the concessioner." Senate Report at 3497-98. Further, concessioner franchise fees were fixed as a percentage of gross receipts and fees could not be unilaterally increased by the NPS. See National Park Service, Concession Policies of the National Park Service, Oct. 13, 1950, *reprinted in* Park Concession Policy, Hearings before the Subcomm. on National Parks of the Comm. on Interior and Insular Affairs, 88th Cong., 2d Sess. 23-31 (1964).

Congress enacted the CPA, 16 U.S.C. § 20 *et seq.*, in 1965. Since its enactment, the text of the CPA has remained unchanged. Congress enacted the CPA principally:

> to put into statutory form policies which, with certain exceptions, have heretofore been followed by the National Park Service in administering concessions within units of the national park system and in writing contracts for concessionaire services there.

Senate Report at 3489.

In order to encourage private parties to invest in and to provide and operate facilities on land owned and managed by the U.S. Government for the benefit of the public, Congress provided specific inducements in the CPA for the concessioners who operate those facilities. With respect to the application and calculation of franchise fees, the CPA provides: (1) the Secretary shall exercise his authority in a manner consistent with "a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the

capital invested and the obligations assumed," 16 U.S.C. § 20b(b); and (2) franchise fees "shall be determined upon consideration of the probable value to the concessioner . . . . Such value is the opportunity for net profit in relation to both gross receipts and capital invested." 16 U.S.C. § 20b(d). Congress further instructed that:

> Consideration of revenue to the United States shall be subordinate to the objective of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates.

16 U.S.C. § 20b(d).

For 36 years, first under the 1950 policy and then under the explicit provisions of 16 U.S.C. § 20b(d), the NPS calculated franchise fees in relation to a concessioner's gross receipts and capital invested and did not increase franchise fees during the term of a concessioner's contract, absent mutual agreement. However, in 1986, the NPS issued NPS-48, a "guidance document" that requires the NPS to calculate average concessioner returns on the basis of gross receipts, equity, and assets.[3] Under NPS-48 these figures are compared to "representative" industry categories from the Dun & Bradstreet, Inc., publication *Industry Norms*.[4] Finally, NPS-48 requires the

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[3] 16 U.S.C. § 20b(d) mandates the use of only gross receipts and capital invested in determining franchise fees. Assets are not to be considered.

[4] In FST's case, the NPS compared FST with "Establishments Primarily Engaged in Furnishing Water Transportation of Passengers, Not Elsewhere Classified." Thus, FST was compared with "airboats (swamp buggy rides),"

NPS, as in FST's case, to adjust the concessioner's previously audited financial figures until they fall within the "representative" industry medians and to thereafter set the franchise fee. Moreover, NPS-48 announced that the NPS was abandoning its previous prohibition against the unilateral increase of franchise fees during a concession contract.

Motor Vehicle required the Fourth Circuit to begin its analysis of NPS-48 with the presumption that the NPS's prior, longstanding policy was correct. Instead, the Fourth Circuit, using *Chevron*, deferred completely to the NPS. At no time did the Fourth Circuit consider the fact that for 36 years the policy of the NPS – including its interpretation of federal statute since 1965 – had been opposite that of the policy contained in NPS-48. In fact, rather than consider how NPS-48 related to the longstanding policy of the NPS, as required by *Motor Vehicle*, the Fourth Circuit found "no problem with the application of NPS-48 to the agreement at hand." *Fort Sumter Tours, Inc., v. Babbitt*, 66 F.3d 1324, 1334 n.3 (4th Cir. 1995). Pet. App. at 15a. Thus, this Honorable Court should grant the Petition to review the decision of the Fourth Circuit that is in direct and irreconcilable conflict with *Motor Vehicle*.

"water taxis," and "transportation on river and canals," businesses that bear little, if any, resemblance to FST. See Dun & Bradstreet, Inc. *Industry Norms* (1994).

B. The Fourth Circuit Failed To Require A Reasoned Explanation From The NPS For Its Abandonment Of Longstanding Policy.

Under *Motor Vehicle*, to overcome the presumption of correctness that attaches to the NPS's longstanding policy with respect to the application and calculation of franchise fees, the NPS must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle*, 463 U.S. at 42. Thus, *Motor Vehicle* requires a reviewing court to determine whether the NPS's abandonment of its prior policy was "reasoned."

The Fourth Circuit erroneously failed to apply the heightened review required by *Motor Vehicle* to NPS-48. If the Fourth Circuit had employed the proper scope of judicial scrutiny to NPS-48, it would have had to review the NPS's longstanding policy and thereafter determine whether the NPS supplied a "reasoned analysis" for the abandonment of that longstanding policy. The Fourth Circuit did neither. Instead, applying *Chevron*, the Fourth Circuit required no explanation whatsoever from the NPS regarding its abandonment of longstanding policy and found "no problem with the application of NPS-48 to the agreement at hand." *Fort Sumter Tours, Inc.*, at 1334 n.3. Pet. App. at 15a.

The Fourth Circuit failed to apply the heightened judicial scrutiny required by *Motor Vehicle* to NPS-48, which abandoned the NPS's longstanding policy with respect to the application and calculation of concession

franchise fees. Indeed, the Fourth Circuit required absolutely no explanation whatsoever for the NPS's abandonment of longstanding policy. Therefore this Honorable Court should grant the Petition to review the decision of the Fourth Circuit which is in direct and irreconcilable conflict with *Motor Vehicle*.

C. The Fourth Circuit Should Have Afforded Considerably Less Deference To The NPS's Adoption Of NPS-48, An Abandonment Of Its Longstanding Policy.

This Honorable Court has consistently held that a reviewing court owes "considerably less deference" to an agency's change in a previously-held position. *See, Good Samaritan*, 124 L.Ed 2d at 382-83; and *Pauley*, 501 U.S. at 698. As discussed above, NPS-48 completely abandoned the NPS's previous interpretation of 16 U.S.C. § 20b(d) and reversed its even earlier, longstanding policy regarding franchise fees. In fact, by administrative fiat alone and with no accompanying change in federal statute, NPS-48 rewrites 16 U.S.C. § 20b(d), the statutory formula for calculating franchise fees, to include concessioner assets and a comparison of concessioner financial data to "representative" industries. Moreover, NPS-48 abandons the NPS's prior policy prohibiting a unilateral increase of concessioner franchise fees. Despite the abandonment of longstanding policy by the NPS, the Fourth Circuit, without reviewing NPS franchise fee history, or requiring any explanation from the NPS, erroneously applied *Chevron* and deferred to the NPS's adoption of NPS-48.

Because the Fourth Circuit erroneously deferred to the NPS's adoption of NPS-48, it ignored the heightened judicial scrutiny required by *Motor Vehicle*, for an agency's change to a longstanding policy. Therefore this Honorable Court should grant the Petition to review the decision of the Fourth Circuit which is in direct and irreconcilable conflict with *Good Samaritan*.

II. THE FOURTH CIRCUIT'S HOLDING, THAT NPS-48 IS ONLY A "GUIDANCE" DOCUMENT AND NOT A LEGISLATIVE RULE THAT REQUIRES COMPLIANCE WITH THE NOTICE-AND-COMMENT REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT, IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A DECISION OF THIS HONORABLE COURT.

The Administrative Procedure Act, 5 U.S.C. § 553(b), requires an administrative agency to give notice of proposed new legislative rules by publishing the terms of the proposed rule or a description of the subjects and issues involved in the *Federal Register*. The agency must also give the public an opportunity to comment on the proposed rules before they are adopted and must consider those comments. 5 U.S.C. § 553(c). "The notice-and-comment requirements apply . . . to so-called 'legislative' or 'substantive' rules. . . . " *Lincoln v. Vigil*, 124 L.Ed.2d 101, 115 (1993) (citing *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320 (1988) and *Community Nutrition Institute v. Young*, 818 F.2d 943, 945-946 (1987)).

The distinction between legislative rules and policy statements has been described as "tenuous," "blurred,"

and "enshrouded in considerable smog." *See, McLouth Steel Products Corp.* at 1320 and *Community Nutrition Institute* at 946. However, two criteria have been identified to assist courts in discerning the distinction. First, "[a] policy statement is one that . . . does not have 'a present day binding effect,' that is, it does not 'impose any rights and obligations,' and second, 'genuinely leaves the agency and its decision-makers free to exercise discretion.'" *McLouth Steel Products Corp.* at 1320 (quoting *Community Nutrition Institute* at 946 & n.4).

Although NPS-48 was used by the NPS to justify the three-fold increase to FST's franchise fees, the Fourth Circuit held that NPS-48 "is not a law or regulation, but rather is only a guideline for use by NPS in making calculations. We find no problem with the application of NPS-48 to the agreement at hand." *Fort Sumter Tours, Inc.*, at 1334 n.3. Pet. at 15a. In so holding, the Fourth Circuit erred because, in fact, NPS-48 is a legislative rule that must be promulgated in accordance with the notice-and-comment requirements of the APA. The holding of the Fourth Circuit thereby creates a direct and irreconcilable conflict with the decision of this Honorable Court in *Lincoln*.

A. NPS-48 Has A Present, Binding Effect.

The NPS uses NPS-48 to calculate concessioner franchise fees. In this case, the NPS used NPS-48 to calculate FST's franchise fees and to impose a three-fold increase to those fees. Indeed, in order to arrive at the franchise fee increase, the NPS used the formula contained in NPS-48 to adjust audited financial figures submitted by FST in

order to fit them within the statistics found in *Industry Norms*. Part of the financial revision to FST's audited financial figures, undertaken pursuant to NPS-48, consisted of: reducing FST's officer salaries by $162,742; invalidating FST's leasing arrangement for the "Spirit of Charleston;" and decreasing FST's actual equity by $347,700 "to approximate industry;" thereby increasing the NPS's calculation of FST's profits to $70,256.

Thus, with respect to this case, NPS-48 has had a present, binding effect and was used to significantly increase the obligations of FST under its concession contract. The Fourth Circuit erred in its holding that NPS-48 is "only a guideline" since, in fact, the NPS uses NPS-48 to "impose . . . obligations" upon concessioners, without having subjected NPS-48 to the APA's notice-and-comment requirements. Therefore, the holding of the Fourth Circuit creates a direct an irreconcilable conflict with the holding of this Honorable Court in *Lincoln*.

B. NPS-48 Constrains The NPS's Discretion.

NPS-48 was promulgated by the NPS to calculate concessioner franchise fees. NPS-48 calculates concessioner franchise fees, not only on gross receipts and capital invested as permitted by 16 U.S.C. § 20b(d), but also on the basis of assets. Moreover, the formula also requires the NPS to compare concessioners financial data to Dun & Bradstreet's *Industry Norms*, in a manner not permitted by 16 U.S.C. § 20b(d).

"If . . . the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative

one." *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C.Cir. 1987). Moreover, "[i]f a statement denies the decisionmaker discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement's position, then the statement is binding, and creates rights or obligations. . . . " McLouth Steel Products Corp., at 1320. When these principles are applied to NPS-48, it is clear that NPS-48 is a legislative, and not interpretative, rule subject to the notice-and-comment provision of the APA.

NPS-48 interprets 16 U.S.C. § 20b(d) to add additional factors for the NPS to consider. Moreover, NPS-48 is used to significantly affect the obligations imposed on concessioners during the term of their concession contracts. Thus, NPS-48 is not "only a guideline" but is indeed, a legislative pronouncement that requires the NPS to promulgated NPS-48 pursuant to the notice-and-comment requirements of the APA. Therefore, the holding of the Fourth Circuit that NPS-48 is only a "guideline" and not a legislative rule creates a direct and irreconcilable conflict with this Honorable Court's holding in *Lincoln*. As a result, this Honorable Court should grant the Petition in order to resolve this conflict.

CONCLUSION

For the foregoing reasons, the National Park Hospitality Association respectfully requests that this Court GRANT the Petition for *Writ* of *Certiorari* of Fort Sumter Tours, Inc.

Respectfully submitted,

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